IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5597 of 2005
With
SPECIAL CIVIL APPLICATION No. 5598 of 2005
To
SPECIAL CIVIL APPLICATION No. 5599 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.H.SHUKLA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOHAMMED SALIM MOHAMMED YUNUS SHAIKH - Petitioner(s)
Versus
KUMUDCHANDRA KESHAVLAL PATEL - Respondent(s)

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Appearance :
MR MB GANDHI for Petitioner(s) : 1,
MR BJ TRIVEDI for Respondent(s) : 1,
MR JT TRIVEDI and Mr. Y.B. Brahmbhatt for the respondent : 1,
MR MITESH R AMIN for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 19/12/2007

COMMON ORAL JUDGMENT

As all these three petitions arise out of the dispute between the same parties in H.R.P. Suit Nos. 446 of 1990, 447 of 1990 and 453 of 1990 in the Small Causes Court at Ahmedabad. These petitions are heard today in view of the oder passed by the Division Bench in Letters Patent Appeal No. 449 of 2006 dated 24.3.2006.

2 The short facts of the case briefly stated are :

3 The petitioner in Special Civil Application No. 5597 of 2005 who is a third party (obstructionist) has filed this petition challenging the order passed below Exh. 67 in Miscellaneous Harkhat Proceedings No. 101 of 2000 in Execution Proceeding No. 210 of 1999. Application Exh. 67 was filed with regard to production of audio cassette recording the conversation with regard to the transaction for

the property in dispute. The said application was rejected by the learned Small Causes Court Judge and therefore the present petition under Article 227 of the Constitution of India has been preferred.

4 Similarly, Special Civil Application No. 5598 of 2005 is filed by the same petitioner third party (obstructionist) challenging the order passed by the Small Causes Court Judge below application Exh. 115 in Harkhat Miscellaneous Application No. 101 of 2000 in Execution Proceedings No. 210 of 1999. The said application Exh. 115 was rejected by the Small Causes Court vide order dated 25.2.2005 and therefore the said order has also been challenged by the petitioner by way of this petition.

5 Special Civil Application No. 5599 of 2005 is also filed by the same petitioner challenging the order of the Small Causes Court below application Exh. 259 in H.R.P. Suit No.

453 of 1990 as well as the order dated 18.2.2005 passed in C.R.A. No. 22 of 2004. The said application Exh. 259 was rejected by the Small Causes Court by order dated 20.9.2004. Therefore, the present petition has been filed challenging the said order.

6 After the petitions were filed and the orders were passed, the interim orders are operating and as a result thereof the aforesaid suits are not proceeded with before the Small Causes Court. A Division Bench (Coram: M.S. Shah and S.D. Dave, JJ) while passing an order in Letters Patent Appeal No. 449 of 2006 filed by respondent No. 1 made an observation referring to the directions of the learned Single Judge given earlier that “the Small Causes Court shall dispose of HRP Suit No. 453 of 1990 at the earliest and latest by 30.6.2004 – this is the outer limit.” However, as recorded in this order of the Division Bench, the matters could not be proceeded and therefore it was also observed that

“we also request the learned Single Judge to hear and decide the said petitions as expeditiously as possible and preferably on this side of the summer vacation.”

7 Thereafter, the matters were not heard and today they are taken up for hearing.

8 Heard learned advocate Mr. M.B. Gandhi for the petitioner and learned advocate Mr. J.T. Trivedi with learned advocate Mr. Y.B. Brahmbhatt for the respondents. Learned advocate Mr. Gandhi for the petitioner in all these matters referring to Special Civil Application No. 5598 of 2005 submitted that the examination-in-chief cannot be deleted and the learned Judge of the Small Causes Court by impugned order below Exh. 115 ordered to delete that part of the examination-in-chief meaning thereby that part of the evidence of the petitioner ordered to be deleted which is not permissible in law. Learned advocate Mr. Gandhi for the petitioner submitted that it would cause

prejudice to his rights.

9 Learned advocate Mr. Gandhi for the petitioner referring to the order passed below Exh. 67 which is challenged in Special Civil Application No. 5597 of 2005 and Exh. 259 which is challenged in Special Civil Application No. 5599 of 2005, submitted that it refers to the production of audio cassette recording the conversation with regard to the property in question and also the prayer for the voice (spectrography) inasmuch as it would bring out the truth if necessary direction is given for such spectrography test directing the respondents to give sample voice which could be thereafter compared with th audio cassette.

10 Learned advocate Mr. J.T. Trivedi appearing with learned advocate Mr. Y. B. Brahmbhatt referred to the order passed by this Court (Coram: A.R. Dave, J) dated 28.8.2003 submitted that as observed in this order

referring to the same set of facts and the case that non-allowing the production of audio cassette at the belated stage. He pointedly referred to the observation made in this order and submitted that the production of the audio cassette has not been permitted by the Small Causes Court which has also been confirmed by this order by this Court. Learned advocate Mr. Trivedi, therefore, submitted that if the production of the document like audio cassette is not permitted there is no question of entering into further exercise of spectrography or voice test of his client i.e. the respondent. It was submitted that this Court may not go beyond the order once it has been finally accepted by the parties. Learned advocate Mr. Trivedi referred to the order passed by this Court (Coram: P.B. Majmudar, J) in Civil Revision Application No. 1100 of 2000 on 25.3.2004 again for the same litigation referring to the order below Exh. 67 in HRP Civil Suit No. 453 of 1990. He pointedly referred to the observations that the issue or

the question whether respondent No. 3 who is permitted to be joined as defendant No. 3 is having any right, title or interest or not is left open to be decided by the trial Court. Therefore, learned advocate Mr. Trivedi submitted that the present petitions may be dismissed.

11 Learned advocate Mr. Gandhi referred to and relied upon the judgement of the Hon'ble Apex Court in the case of HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION VS. CORK MANUFACTURING CO. reported in 2007(8) SCC 120 and submitted that as observed by the Hon'ble Apex Court any additional evidence would be permissible and therefore it was submitted that the production of the audio cassette ought to have been permitted.

12 In view of the rival submissions, it is required to be considered whether the order passed on different applications referred to hereinabove by the Small Causes Court, challenged by way of the present petitions would call for

any interference in light of the orders passed by this Court in Civil Revision Application No. 1100 of 2000 (Coram: P.B. Majmudar, J) and in Special Civil Application No. 3705 of 2003 (Coram: A.R. Dave, J).

13 There is no dispute that the production of the audio cassette was not allowed and the said application Exh. 67 was dismissed by the Small Causes Court. Against that order the petitioner herein had also moved Special Civil Application No. 3075 of 2003 and the orders passed by the Small Causes Court and the appellate Bench were confirmed. It was specifically observed in the aforesaid order in Special Civil Application No. 3075 of 2003 referring to the judgement of the Hon'ble Apex Court in the case of MADANLAL VS. SHYMALAL reported in 2002(1) SCC 535 that “to substantiate his case that at a belated stage such an application for production of documents should not be entertained by the trial Court and the

trial Court was justified in rejecting the application". Therefore, in light of the aforesaid observations made, the High Court while passing the order (brother Mr. Justice A.R. Dave) in Special Civil Application No. 3075 of 2003 specifically observed that "upon perusal of the record it is clear that the proceedings for execution of decree had been initiated long back. Learned advocate who was appearing for the petitioner at an earlier point of time expired somewhere in November, 1999. For the first time, when the application for production of the cassette had been filed on 20.2.2001, no justifying reason has been stated in the application for the delay caused in filing the application. The averment with regard to settlement does not appear to be of any substance." Again in this order referring to the case of MADANLAL VS. SHYAMLAL (Supra), the Court refused to interfere with the impugned order as it was found just, legal and proper.

14 Therefore, in view of the observations and the orders passed by the High Court including the order passed earlier in Special Civil Application No. 3075 of 2003. I do not see any reason to interfere with the impugned order, because even in my opinion, no case has been made out by the petitioner for late submission of the application. In my opinion, the impugned order is just, legal and proper. Therefore, when the production of the cassette as document is not permitted by the Small Causes Court and confirmed by this Court by the aforesaid order in Special Civil Application No. 3075 of 2003 dated 28.8.2003, the submission made by learned advocate Mr. Gandhi with regard to spectrography test of respondent No. 1 i.e. learned advocate Mr. Trivedi's client would not be justified inasmuch as when the production of the document itself i.e. audio cassette is not allowed, there is no question of entering into any further exercise of getting voice test/spectrograph if it is not allowed to be considered in the evidence.

Therefore, the prayer made in Special Civil Application No. 5597 of 2005 and 5599 of 2005 cannot be accepted.

15 However, the submission made by Mr. Gandhi, learned advocate for the petitioner that even if the production of the document like audio cassette is not permitted but the evidence that is examination-in-chief of the petitioner which has been recorded, the same cannot be deleted even if it refers to the part of the audio cassette. In my view, the submission is well founded inasmuch as once the evidence of a party is recorded, the same cannot be deleted and it will be subjected to further cross-examination by the other side and the other side will have all the opportunity to cross-examine and seek clarification on that aspect. Again after the cross-examination and the entire evidence is over, it will be a matter of appreciation of evidence by the trial Court. Therefore, the impugned order below Exh. 115 in Misc. Harkhat

Proceedings No. 101 of 2000 in Execution Proceedings No. 210 of 1999 directing for deletion of the examination-in-chief on pages 29 to 80 would not be justified and proper. Therefore, the prayer made in Special Civil Application No. 5598 of 2005 for quashing and setting aside the order below Exh. 115 dated 25.2.2005 passed by the learned Small Causes Judge deserves to be granted.

16 Therefore, in light of the aforesaid discussion Special Civil Application Nos. 5597 of 2005 and 5599 of 2005 hereby stand dismissed. Rule is discharged accordingly. Special Civil Application No. 5598 of 2005 stands allowed. Rule is made absolute accordingly. The prayer in terms of para 13(b) deserves to be granted and the order passed below Exh. 115 in Harkhat Misc. Application No. 101 of 2000 in Execution Proceedings No. 210 of 1999 dated 25.2.2005 is hereby quashed and set aside. However, it is clarified that though this part is not to be

deleted, the other side i.e. the respondent will have full opportunity of cross-examining the petitioner on this aspect and thereafter it will be for the learned Small Causes Court Judge to consider the same in accordance with law while appreciating the evidence. It goes without saying that the learned Small Causes Court Judge will decide the matter in accordance with law without being influenced by the order of this Court. The learned Small Causes Court shall proceed with the hearing and dispose of the suit in light of the order passed by this Court in Letters Patent Appeal No. 449 of 2006 as well as Civil Revision Application No. 1100 of 2000. Direct service to learned advocate Mr. Brahmbhatt for respondents is permitted.

17 Learned advocate Mr. Gandhi for the petitioner requests that some time may be granted to enable his client to approach the higher forum and the order may be stayed or kept in abeyance for some time. Mr. Trivedi, learned advocate for

the respondents has objected and stated that as the trial/execution proceeding has not been proceeded for a long time, direction for expeditious hearing may be given. It would be in fitness of things if the request made by learned advocate Mr. Gandhi for the petitioner is accepted for a limited period of six weeks. Accordingly, the order is stayed for a period of six weeks to enable the client of learned advocate Mr. Gandhi to take appropriate course as may be advised.

(R.H. SHUKLA, J)

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